DATE: August 26, 1996

CASE NO: 94-ERA-41

In The Matter Of

SAYED MANSOUR,
Complainant

v.

ONCOLOGY SERVICES CORPORATION
Respondent

Appearances:

Timothy G. Griffin, Esq.
On Behalf of the Complainant

Marcy Colkitt, Esq.
On Behalf of the Respondent

Before: Ainsworth H. Brown
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under Section 210 of the Energy Reorganization Act ("ERA") of 1974, 42 U.S.C. § 5851 (1982) (hereinafter "the Act"), which prohibits a Nuclear Regulatory Commission ("NRC") licensee from discharging or otherwise discriminating against an employee who has engaged in activity protected under the Act. The Act, designed to protect so-called "whistleblower" employees from retaliatory or discriminatory actions by their employers, is implemented by regulations found at 29 C.F.R. Part 24. A hearing was held before me on December 12, 1995, in Cranford, New Jersey, at which time the parties were given the opportunity to present oral and written arguments, witnesses and documentary evidence.

FACTUAL BACKGROUND

Sayed Mansour (hereinafter "Complainant") graduated with a B.S. degree in health and physics from Manhattan College in 1983, a Master's degree in physics from Ploytech University of Brooklyn in 1989, and his employment prior to working for the Respondent, Oncology Services Corporation (hereinafter "OSC"), included work at Lutheran Medical Center, Harlem Medical Center, Our Lady of Mercy

Medical Center and New York Cornell University. (Rx[1] 2 at 4-11.) He took a test for certification by the American Board of Radiation Therapy some time in 1992[2], but failed, and was never certified. (Rx 2 at 14-18.) He was hired by OSC as a Medical Physicist, on October 12, 1992. (Tr. at 17.)

Complainant was based out of a medical center in Harrisburg, Pennsylvania, during his tenure as a medical physicist. His duties involved visiting various radiation centers in Pennsylvania which "belong to" OSC, including centers in Lebanon Valley, Littletown, Pittsburgh and Indiana, and providing physics service and consultations. (Tr at 18.) Complainant explained his "consultation" duties:

> It's required by the law that the patient is to be reviewed by the medical physicist as a part of quality assurance that the dose was delivered accurately to the patient according to the physician prescription. And in the meantime calibrating the machine, make sure that the machine give accurate output, which in the meantime if it was calculated to give the accurate dose prescribed the physician as part of quality assurance.

(Tr at 18-19.)

Some time around April, 1993, Complainant was promoted to Assistant to OSC President Dr. Douglas Colkitt, and was relocated to OSC corporate headquarters in State College, Pennsylvania. The duties of his new position included medical physicist recruitment, procurement of equipment for OSC and development of a reporting system for the medical physicists. (Tr. at 292-294.) Complainant was also assigned to a task force run by OSC's General Counsel, Marcy Colkitt, to work on state and federal regulatory licensing[3].

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[1] The following references are used herein: "Tr" refers to the Transcript of the formal hearing held on December 12, 1995; "Rx" refers to Respondent's exhibit; and "Cx" refers to Complainant's exhibit.

[2] Complainant indicated that he sat for the test again in July, 1994 (Rx 4 at 14), but later maintained that he sat for the test only once, (Rx 4 at 15, 16).

[3] Dr. Derdel explained that the nuclear material used in OSC's treatment centers is regulated either by the states or the federal Nuclear Regulatory Commission, depending on whether the state in which the treatment center is located is an "agreement state," i.e., a state that has an agreement with the NRC allowing the state to oversee the use of radioactive materials under the auspices and direction of the NRC.

Among the license renewals which Complainant worked on was a strontium 90 applicator (hereinafter "SR90") used at the Indiana Regional Cancer Center ("IRCC") in Indiana, Pennsylvania. (Tr at 39.) At some point during Complainant's work on this license renewal, Dr. Bauer, the treating physician at IRCC, indicated to Complainant that he uses the SR90 for treatment of skin lesions as well as eye disease. Complainant became concerned that the use of the SR90 to treat skin lesions violated the NRC license.

Complainant testified to several instances when he expressed his concerns about the misuse of this license. He submitted a memorandum dated April 29, 1993 and addressed to Dr. Bauer, in which he informed Dr. Bauer:

> Your SR90 renewed application has been submitted to NRC region 1 and it will be send [sic] to your directly ... Please be advised that SR90 applicator is a beta particles radiation source which has a very short penetrability and <u>it's used and licensed for eye treatment only</u>.

(Cx 2) (emphasis added). The memorandum indicates that a copy was sent to Dr. Colkitt, OSC Vice President Dr. Derdel and Joanne Russell[4], in addition to Dr. Bauer.

Dr. Derdel testified that he never received the memorandum. (Tr at 338-339.) OSC had the memorandum analyzed by a Certified Forensic Document Examiner, J. Wright Leonard, along with a May 16, 1994 letter, sent by Complainant to the Department of Labor, which served as the complaint that initiated the instant proceeding. Wright submitted a report in which he concluded that these two documents "were produced by the same typeface element." Complainant testified that he typed the April 29, 1993 memorandum at OSC headquarters in State College (Tr at 235) and that he typed the May 16, 1994 letter, after he was terminated, at a friend's house in Brooklyn, New York. (Tr at 231-234.) Therefore, Respondent argues, "it is now clear that [Complainant] fraudulently created the alleged April 29, 1993 memo to Dr. Bauer concerning the strontium 90 matter and perjured himself at the December 12, 1995 hearing." (Respondent's Post-Hearing Brief at 28.)

Complainant also testified regarding several occasions on which he brought his concern, about the misuse of the SR90, to OSC's attention orally. Specifically, Complainant testified that he discussed the issue three times with Dr. Colkitt. The first time was around April, 1993, when he first started working on the IRCC license renewal. (Tr at 48.) The second time was in July,

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[4] Complainant testified that Joanne Russell is Dr. Colkitt's wife and also an officer of OSC, but he could not identify what office she held. (Tr at 43.)

1993 and the third time was in September, 1993. (Tr at 50.) Complainant also testified that he discussed the issue with Dr. Derdel and Mitch Geroz, a medical physicist at the OSC treatment center in Pittsburgh, Pennsylvania. (Tr at 47.) In addition, Complainant testified that an "independent locum"[5], Gallagher, was in the presence of Dr. Colkitt when Complainant first informed Dr. Colkitt of the issue. Dr. Derdel testified that Complainant never discussed the misuse of the SR90 with him. (Tr at 289.)

In or around October or early November, 1993, Dr. Derdel had a conversation with Complainant regarding reorganization and regionalization of the physics department, as well as the misuse of the SR90 at IRCC. (Tr at 65.) Complainant testified that Dr. Derdel informed Complainant that Complainant's position was to be eliminated, and that perhaps Complainant should "move to New York rather than driving all the time." (Tr at 65.) Complainant maintained that he did not believe he was being terminated at that time, and that it was not until the second week in November that he was told that he was terminated. (Tr at 104.)

Dr. Derdel testified that this initial conversation took place on the Monday, Tuesday, or Wednesday after an ASTRO conference[6], which was held on October 10 through October 15, 1993. (Rx 19.) Dr. Derdel maintained that he initially told Complainant that he was terminated and that the termination would be effective November 1, 1993. (Tr at 317.)

Complainant called the NRC on or about November 2, 1993, and scheduled a meeting with Gerard Kenna, an investigator with the NRC Office of Investigations, for November 4, 1993. (Tr at 66.) At that meeting, Complainant discussed the licensing issues and IRCC's misuse of the SR90. (Id.) A sworn declaration by Mr. Kenna was submitted (Rx 1), along with his "Report of Interview With Confidential Source" which Kenna prepared as a result of the November 4, 1993 interview with Complainant. In the Declaration, Kenna indicates that "during the November 4, 1993 interview, [Complainant] also advised the NRC that he had been asked to leave his employment with the NRC." (Id.) Complainant maintains that he told Kenna, at the November 4, 1993 meeting, only that he had been asked to seek a job in New York, (Tr at 112), not that he was terminated.

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[5] OSC and Complainant referred to those health physicists contracted to work on an hourly basis, rather than retained as employees, as "independent locums." (Tr at 23.)

[6] Dr. Derdel and Complainant had both attended a conference of the American College of Radiology and the American Society for Therapeutic Radiology and Oncology ("ASTRO") in New Orleans, Louisiana. (Rx 19.)

Complainant testified that he told Dr. Colkitt that he had spoken with the NRC some time between November 4 and November 19. (Tr at 205.)

Approximately one week after Complainant's meeting with Kenna, the NRC conducted an investigation of the IRCC facility. (Tr at 67.) As a result of that investigation, an agreement was reached between OSC and the NRC, no violation was asserted, and Dr. Bauer was removed as Radiation Safety Officer. (Rx 1, Tr at 287-288.)

Complainant alleges that on November 18, 1993, Dr. Derdel told him that he was terminated, effective immediately. Complainant requested a written memorandum to that effect, and was given the memo on November 19. He left OSC on November 19, and had another meeting with the NRC, regarding a situation involving a potential OSC violation at a Flagstaff, Arizona facility[7]. (Cx 3, Tr at 76.)

Complainant continued to receive his salary from OSC through February, 1994, and alleges that he had continuing discussions with Dr. Colkitt during that period, in which Dr. Colkitt urged him to seek referrals for OSC from a hospital in Westchester, New York.

OSC maintains that Complainant's concerns with the improper use of the SR90 were not the reason for his termination. Rather, OSC asserts that Complainant was terminated because the reorganization and regionalization of the physics department dispensed with the need for Complainant's position[8], and that Complainant would have been terminated shortly thereafter in any event, because of a variety of job-performance-related problems.

One such problem involved Complainant's reporting of certain rumors pertaining to OSC to an NRC investigator, Dr. Shambaki. (See Rx 4.) Dr. Shambaki and Complainant spoke to each other, in arabic, during a break during an NRC investigation of OSC's Pittsburgh facility. Complainant told Dr. Shambaki that there were rumors that an OSC physicist had staged the incident which the NRC was investigating, and that Dr. Cunningham, OSC's prior Director of Physics, was involved in a love affair with an NRC inspector who "helped with things." (Rx 4.) At the hearing, Complainant maintained that he intended for his discussions with Dr. Shambaki

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[7] Complainant alleged that Dr. Derdel asked him to go to Flagstaff and sabotage a piece of OSC equipment, to "show the power of OSC." (Tr at 190-193.)

[8] Complainant had been aware, since April or May, 1993, that the reorganization and regionalization of the physics department was underway. (Tr at 296-297.) Complainant testified that the regionalization was a good idea, (Tr at 241), and Complainant concedes that the regionalization plan has taken effect, (Complainant's Post-Hearing Brief at 23).

to be "off the record." (Tr at 159, 164-165). He agreed that the reports of the Pittsburgh incident being staged and Dr. Cunningham's love affair with an NRC inspector were unsubstantiated rumors. (Tr at 161.)

Another incident cited by OSC was Complainant's representation to the State of Maryland, Department of Environment, Radiological Health Program, that he was the Director of Physics for OSC, a position which he never held and admittedly was not qualified for[9]. (Rx 6.) Complainant maintained that he obtained Dr. Colkitt's acquiescence before he sent the letter containing the misrepresentation. (Tr at 182-186.)

Dr. Derdel testified regarding OSC's perceived problems with Complainant's performance of his equipment-procurement duties. (Tr at 300-304.) He explained that Complainant, upon obtaining approval from OSC's Chief Financial Officer ("CFO"), Jude Spack, to purchase equipment, purchased the equipment in his own name or in the name of a consulting firm of his own, rather than in the name of OSC and without using OSC purchase orders. Dr. Derdel explained that the equipment was thus invoiced in Complainant's name and not invoiced for OSC, and, when it arrived, it was delivered to Complainant. When it was then disbursed to the individual treatment centers, there was an inadequate paper trail, making it difficult or impossible to verify what equipment was received and where it was located.

Dr. Derdel testified that this equipment procurement problem is the reason why Complainant's termination was not effective immediately when OSC originally determined to terminate him, during the week after the ASTRO Conference. Dr. Derdel explained that there were invoices outstanding, in Complainant's name, which OSC had not yet paid, since they could not trace and verify the receipt or location of the equipment. Complainant was concerned that the suppliers might hold him personally responsible for payment. Therefore, Dr. Derdel explained, Complainant was given until November 1 to straighten out the invoices with Jude Spack, the CFO. On November 1, the problem was still not straightened out, and OSC continued to give Complainant more time. Finally, on November 18, OSC determined that the problem might never straighten out, and terminated Complainant, effective immediately. Dr. Derdel also pointed out that some time after Complainant's termination, Complainant returned a box containing $5,000 to $7,000 worth of equipment that he had in his possession, along with a beeper, and that Complainant insisted that OSC sign the invoice so he would not be personally liable for the equipment. (Tr at 318-321.)

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[9] Complainant nonetheless maintained that Dr. Colkitt offered him the Director of Physics position, but he turned it down. (Tr at 133.)

Complainant testified that he obtained the equipment for OSC at better prices by representing to the suppliers that the equipment was for himself, as a physicist, and that he saved OSC a substantial amount of money that way. (Tr at 37.) Dr Derdel testified, however, that OSC had looked into the prices and concluded that Complainant was not getting the equipment any cheaper. (Tr at 300.)

Marcy Colkitt testified regarding a conversation she had with Complainant on July 22, 1993. (Tr at 385.) She testified that Complainant told her that Dr. Shambaki requested that OSC pay for Dr. Shambaki's family to go to Florida, or else Dr. Shambaki would impede the licensing process. She testified that she suggested to Complainant that they immediately bring the NRC in the phone conversation on another line, at which point Complainant "backed off" and told her that perhaps Dr. Shambaki was "just joking around." She testified that she then discussed the incident with Dr. Colkitt, and together they determined that perhaps they should not immediately report the incident to the NRC, in order to avoid tarnishing Dr. Shambaki's reputation on the basis of this unsubstantiated report by Complainant. (Tr at 390.) Instead, Marcy Colkitt distributed a July 26, 1993 memorandum to a number of employees, including Complainant[10], instructing them to avoid improper or unethical conduct when dealing with the NRC. (Rx 20.)

Complainant denied ever telling anyone that Dr. Shambaki asked him for a bribe, asked him to have anybody pay for a vacation in Florida for his family, or any other favors on behalf of OSC in order to help expedite licensing matters. (Tr at 186-187.)

Complainant also denied that he ever called Marcy Colkitt's office and pretended to be Dr. Colkitt. (Tr at 247.) However, Marcy Colkitt testified that Claimant once "called and my secretary said Doug is on the phone and said to me there's something wrong, and I picked up the phone and it was him, [Complainant]. He thought it was rather funny." (Tr. at 393.)

Respondent alleges that these problems with Complainant's job-performance would have led to his termination in absence of the reorganization and regionalization of the physics department.

ISSUES

(1) Whether the instant complaint was timely filed in accordance Section 5851(b) of the Energy Reorganization Act, 42 U.S.C. § 5851(b); and

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[10] Marcy Colkitt explained that she distributed the memorandum to the other employees "because I didn't want to send a memo directly only to [Complainant] because I didn't think it would be a nice thing to have in a file." (Tr at 395.)

(2) Whether Complainant was terminated or otherwise discriminated against as a result of any activity protected under Section 5851(a)(1) of the Energy Reorganization Act, 42 U.S.C. § 5851(a)(1).

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. TIMELINESS

The filing period for a whistleblower claim is contained in Section 5851(b) of the Act, which provides, in part:

> Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within 180 days after such violation occurs, file ... a complaint with the Secretary of Labor alleging such discharge or discrimination.

42 U.S.C. § 5851(b) (emphasis added). The Secretary of Labor (hereinafter "the Secretary") has held that the 180 day filing period commences on the date that the complainant is informed of the challenged employment decision, not the time the effects of the decision are ultimately felt. See Ballentine v. Tennessee Valley Authority, 91-ERA-23 (Sec'y September 23, 1992). Notice of the challenged decision, however, must be final, definitive and unequivocal to trigger the 180 day filing period. See Larry v. Detroit Edison Co., 86-ERA-32 (Sec'y June 28, 1991). The Secretary has explained that "final" and "definitive" notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. "Unequivocal" notice denotes communication that is not ambiguous, i.e., free of misleading possibilities. Id.

In the instant case, Respondent argues that Complainant has admitted, through his own testimony, that he was orally notified of his termination, in final and unequivocal terms, in late October, 1993. Complainant argues that the notice which he received was not final and unequivocal until he received the written memorandum on November 19, 1993, indicating that he was terminated.

Based upon Complainant's own testimony and the testimony of Dr. Derdel, I find that Complainant was informed, in late October, 1993, that his position at OSC was going to be eliminated. Complainant's trial testimony and deposition testimony are consistent with this finding. (See e.g. Cl's dep. at 194; Tr at 65, 103, 206, 257.)

That notice, however, was not an unequivocal and unambiguous notice of termination. In the context of a broader reorganization and regionalization, Complainant could reasonably have interpreted

this initial discussion with Dr. Derdel to imply that he might be given other responsibilities within OSC. Such an interpretation is supported by the uncontroverted fact that Dr. Derdel suggested that Complainant "move to New York rather than driving all the time," (Tr at 65), and the uncontroverted fact that Dr. Colkitt continued to urge Complainant to obtain referrals for OSC from Dr. Vickram to an OSC treatment center in Westchester, New York. These facts reasonably imply that OSC expected its employment relationship with Complainant to continue. Therefore, the notice that Complainant's position was being eliminated was ambiguous, at best, regarding Complainant's continuing employment.

I, therefore, find that Complainant was not provided with unambiguous notice of the decision to terminate him until his discussion with Dr. Derdel on November 18, 1993, which was reduced to writing in a memorandum which Complainant received on November 19, 1993[11]. (Rx 8.) Pursuant to the ERA, 42 U.S.C. § 5851(b)(1), Complainant therefore had 180 days from November 18, 1993 to file his complaint. The instant complaint was filed on May 17, 1994, and as a consequence was timely.

II. Unlawful Termination/Retaliation

OSC argues that Complainant's protected activity could not have been the basis for the termination decision, since Complainant's confidential report to the NRC regarding the alleged misuse of the SR90 applicator occurred after he was notified of his termination. I find this argument unavailing.

Under subsection (A) of ERA § 5851(a)(1), an employee's "notifi[cation to] his employer of an alleged violation of [the ERA]" is a prohibited basis for discrimination. The Secretary and the Circuit Courts have thus repeatedly held that "internal

[11] The November 18, 1993 letter states "As we have discussed, your position with Oncology Services Corporation has been eliminated. Accordingly, today is your last day of employment." (Rx 8.) Respondent argues that this language demonstrates that the decision to terminate Complainant had been previously discussed. (Respondent's Post-Hearing Brief at 14.) Semantically, however, the language only implies that the elimination of Complainant's position had been previously discussed. As noted above, the elimination of Complainant's position does not necessarily equate with Complainant's termination. Alternatively, the "as we have discussed" language might simply refer to the discussion earlier that same day, which Complainant requested be reduced to writing. Therefore, I note that this letter is not persuasive evidence that Complainant had prior unambiguous notice of the decision to terminate him.

complaints"[12] constitute protected activity under the ERA. See Hermanson v. Morrison Knudsen Corp., 94-CER-2 (ARB June 28, 1996); Dysert v. Westinghouse Electric Corp., 86-ERA-39 (Sec'y October 30, 1991); Bassett v. Niagara Mohawk Power Corp., 85-ERA-34 (Sec'y September 28, 1993); Mackowiak v. University Nuclear Systems, 735 F.2d 1159 (9th Cir. 1984); Kansas Gas & Electric Co. v. Brock, 780 F.2d 1505 (10th Cir. 1985), cert. denied 478 U.S. 1011 (1986); Passaic Valley Sewerage v. United States Department of Labor, 992 F.2d 474, 481 (3d Cir. 1993) (case decided under the Water Pollution Control Act). The Secretary has also held that the internal complaint need not be raised with any degree of formality; any informal complaint is sufficient protected activity. See Samodurov v. General Physics Corp., 89-ERA-20 (Sec'y November 16, 1993); Nichols v. Bechtel Construction, Inc., 87-ERA-94 (Sec'y October 26, 1992); Crosier v. Portland General Electric Co., 91-ERA-2 (Sec'y January 5, 1994).

Therefore, based upon Complainant's testimony and Complainant's exhibit 2, I find that Complainant engaged in activity protected by ERA § 5851(a)(1) well before his November 4, 1993 report to the NRC, and before OSC arrived at the decision to terminate his employment. Specifically, Complainant testified that he discussed the misuse of the SR90 license with Dr. Colkitt on three occasions between April and September, 1993, and also discussed it with Mitch Geroz, an independent locum named Gallagher and Dr. Derdel. Although Dr. Derdel testified that Complainant never discussed the issue with him, Complainant's testimony regarding his discussions with Dr. Colkitt, Mitch Geroz and Gallagher, stands unrebutted. This testimony alone is sufficient to establish that Complainant engaged in protected activity. See Samodurov v. General Physics Corp., 89-ERA-20 (Sec'y November 16, 1993) (a complainant's testimony of an informal safety complaint to a supervisor is sufficient to establish protected activity; corroborating evidence is not required). In addition, however, Complainant's April 29, 1993 letter to Dr. Bauer indicates, on its face, that a copy was sent to Dr. Colkitt, Dr. Derdel and Joanne Russell. Respondent has not presented any evidence which persuades me to the contrary[13].

Complainant has thus established that he engaged in activity protected by the whistleblower provisions of the ERA before OSC

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[12] An "internal" complaint is one lodged with a supervisor of the company itself, while an external complaint is one lodged with an outside agency, such as the NRC. Kahn v. United States Secretary of Labor, 64 F.3d 271 (7th Cir. 1995).

[13] Rather, OSC has, at best, demonstrated that the April 29, 1993 letter was typed on the same machine (typewriter, computer or word processor) as the May 16, 1994 complaint. I do not conclude, however, that the document was fraudulently created.

reached the challenged employment decision, i.e., the decision to terminate him. The central remaining issue is whether that protected activity actually motivated the decision.

Regarding whistleblower cases generally, the Secretary has explained that "[a]fter a case has been fully tried on the merits, the ALJ's job is to weigh all the evidence and decide whether the Complainants have proven by a preponderance of the evidence that Respondent intentionally discriminated against them because of protected activities." Jackson v. Ketchikan Pulp Co., 93-WPC-7 & 8 (Sec'y March 4, 1996) slip op. at 4-5, n.1. The trier of fact may conclude that the employer's proffered reason for the challenged adverse employment action is a pretext, and unlawful retaliation was in fact the reason. Conversely, the trier of fact may find that the employer was not motivated, in whole or in part, by the employee's protected activity and rule that the employee has failed to establish his case by a preponderance of evidence. Finally, the finder of fact may decide that the employer was motivated by both prohibited and legitimate reasons, i.e., that the employer had "dual motives." Dartey v. Zack Co. of Chicago, 82-ERA-2 (Sec'y May 25, 1983).

In dual motive cases, where the employer was motivated by both prohibited and legitimate reasons, the Secretary applies the burden of proof analysis of discrimination cases arising under the National Labor Relations Act. Dartey, 82-ERA-2. The employee must prove, "by a preponderance of the evidence, that the protected conduct was a motivating factor in the employer's action" for the burden of proof or persuasion to shift to the employer[14]. Id.

[14] Respondent argues that to prevail in a "mixed motives" case, Complainant must produce "direct evidence" of discrimination, "i.e., more direct evidence than is required for the McDonnell Douglass/Burdine prima facie case." (Respondent's Br at 32, citing Starceski v. Westinghouse Electric Corp., 54 F.3d 1089, 1096 (3d. Cir. 1995)). Respondent points out that the Starceski court required "conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged discriminatory attitude."

This standard, although applicable in the Third Circuit to Title VII and ADEA cases, is not properly applicable in the instant case. The Secretary has chosen not to apply Title VII analysis to dual motive cases under the environmental whistleblower protection statutes, but, rather, has adopted the Wright Line test applied by the National Labor Relations Board ("the Board") to cases of anti-union-animus-based discrimination. In determining whether an employer's action is unlawfully motivated, the Board frequently relies on circumstantial evidence to shift the burden to the employer. See Merchants Truck Line v. N.L.R.B., 577 F.2d 1011 (5th Cir. 1978), enf'g 232 N.L.R.B. 676 (delay in discharge after the

(emphasis added) citing Wright Line, A Division of Wright Line, Inc., 251 N.L.R.B. 1-83 (1980).

Pursuant to the 1992 amendments to the ERA, if the complainant demonstrates, by a preponderance of the evidence, that protected activity was a motivating factor, the respondent may avoid liability only by establishing, by clear and convincing evidence, that he or she would have been terminated in the absence of the protected activity. See 42 U.S.C. § 5851(b)(3)(D); Johnson v. Bechtel Const Co., 95-ERA-11, slip op. at 2 (Sec'y September 28, 1995).

In the instant case, I find that OSC was not motivated, in whole or in part, by Complainant's protected activity in deciding to terminate him. Rather, I find that the regionalization and reorganization of the physics department rendered Complainant's position obsolete and, due to the concern with Complainant's job performance, unrelated Complainant's protected activity, OSC had no interest in finding another job for him within the new structure of the department. Complainant has presented no evidence or argument which suggests that the reorganization and regionalization of the physics department was a pretext, and I credit OSC's evidence of concerns about Complainant's job performance.

Specifically, I find that OSC was dissatisfied with Complainant's performance of his procurement duties. Dr. Derdel provided a detailed explanation of the difficulties in verifying receipt and location of equipment which Complainant ordered in his own name and invoiced improperly. Complainant first denied that he ordered equipment in his own name, only to later admit that he did so to save money for OSC. (See Tr at 36-38.) Regardless of whether or not any money was actually saved, I find that this

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alleged offense is discovered); Wells Dairy d/b/a/ Wells Blue Bunny, 287 N.L.R.B. 827 (1987), enf'd 865 F.2d 175 (8th Cir. 1989) (departure from established procedures for discharge); Forest Park Ambulance Serv., 206 N.L.R.B. 550 (1973) (failure to tell the employee the reason for the discharge at the time of discharge); Clark & Wilkins Indus., 290 N.L.R.B. No. 19 (1988), enf'd 887 F.2d 308 (D.C. Cir. 1989) (timing of the discharge). Indeed, the Secretary's decisions under the ERA also suggest that circumstantial and inferential evidence can invoke a dual motive analysis and shift the burden of proof or persuasion to the employer. See Young v. CBI Services, Inc., 88-ERA-8 (Sec'y December 8, 1992) slip op. at n.4; St. Laurent v. Britz, Inc., 89-ERA-15 (Sec'y October 26, 1992), slip op. at 4 n.3. Direct evidence that Respondent's decision-makers relied on Complainant's protected activity in deciding to terminate him is thus not a prerequisite to a dual motive finding and burden shifting analysis. A preponderance of evidence, whether circumstantial and inferential in nature or direct, is all that is required.

caused OSC to have a legitimate concern with Complainant's performance of these duties, unrelated to his protected activity.

OSC also had a legitimate concern about the fact that Complainant conveyed rumors to the NRC that Dr. Cunningham was involved in a love affair with an inspector and that OSC staged the incident at the Greater Pittsburgh treatment center. Although I believe Complainant may have conveyed these rumors with the honest belief that he was merely gossiping, off the record, with a fellow countryman, he nonetheless exercised undeniably poor judgment in conveying such rumors to an NRC inspector. OSC's concern over this incident was a legitimate one, unrelated to any protected activity.

Finally, I credit the testimony of Marcy Colkitt over that of Complainant, regarding Complainant's request of a bribe for Dr. Shambaki. The July 26, 1993 memorandum (Rx 20) lends credibility to Marcy Colkitt's testimony that Complainant in fact requested the bribe, and Complainant has not suggested an alternative explanation for why that memorandum was distributed.

Complainant's argument that his termination was based on his protected activity is primarily based on an inference he draws from the timing of his discharge. Complainant points out that he was terminated "merely two (2) days following the suspension and order enforcement by the NRC." (See Complainant's Brief at p. 18.) Complainant further notes the "tremendous problems" which resulted from his report to the NRC. (See Complainant's Brief at 21, quoting Tr at 400, testimony of Marcy Colkitt.)

I find, however, based on the testimony of Dr. Derdel, that OSC had already reached the decision to terminate Complainant before Complainant went to the NRC. I find that OSC had reached the decision by the week in late October, 1993, following the ASTRO conference, when Dr. Derdel told Complainant that his position was being eliminated. Although Dr. Derdel used ambiguous wording to tell Complainant he was terminated at that time (rendering the notification ineffective for purposes of evaluating the timeliness of the complaint under § 5851(a)(1) of the Act, (see Discussion of "Timeliness," supra. at 8-9)), I am nonetheless convinced that the decision to terminate Complainant had already been reached. Therefore, any inference of causation cannot be based on Complainant's report to the NRC on November 4, 1993, and the consequences thereof; rather, the inference must be based on Complainant's earlier internal complaints, in April through September, 1993.

Based on the timing of these internal complaints and the decision to discharge Complainant in the end of October, 1993, I find the inference of causation very weak. Moreover, apart from this weak timing inference and his own unsupported assertions, Complainant has presented no evidence or argument linking the decision to his protected activity. In light of OSC's serious

concerns with Complainant's job performance, for reasons unrelated to any protected activity, I find that Complainant has failed to establish that OSC's decision to terminate his employment was motivated in whole or in part by his protected activity.

Complainant has therefore failed to establish entitlement to any relief under the whistleblower protection provisions of the ERA.

RECOMMENDED ORDER

Based on the foregoing, it is recommended that the complaint of **SAYED MANSOUR** be **DENIED** in its entirety.

AINSWORTH H. BROWN
Administrative Law Judge

Camden, New Jersey

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. The Administrative Review Board has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978.